United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2605
75-7088

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD RHOADS, MARILYN RACER and SUSAN HESSE,

Plaintiffs-Appellees,

-against-

J. BENJAMIN McFERRAN, individually and as Director of Personnel for the New York State Department of Social Services, and SIDNEY HOUBEN, individually and as head of the Bureau of Disability Determinations, New York State Department of Social Services,

Defendants-Appellants,

REPLY BRIEF FOR
DEFENDANTS-APPELLANTS

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Defendants-Appellants,	:	

REPLY BRIEF FOR
DEFENDANTS-APPELLANTS

Statement

This brief is submitted in reply to plaintiffs-appellees' brief. It seeks to clarify certain misstatements and misconceptions about the present appeal.

POINT I

PLAINTIFFS CANNOT ASSUME THEIR RIGHT TO FREE SPEECH IS UNLIMITED ON WORK PREMISES.

As we have heretofore stated, plaintiffs cannot place this action in a pure "free-speech" category and simply assume defendants must prove their right to abridge same. In the first place defendants never had a chance to "prove" anything. Summary judgment was granted against them. Secondly, citing Perry v. Sindermann, 408 U.S. 593 (1972), Appellee's Brief, p. 8, hardly shows that defendants cannot control their work premises, access and the like. Perry simply stands for the proposition a "tenured" teacher must be given a hearing by a college on allegations that his employment was terminated for exercise of his right to free speech. However, in the instant case, appellees received a hearing here via the grievance procedure.

To brush aside Broadrick v. Oklahoma, 413 U.S. 601 (1973) and Civil Service Commission v. Nat. Assoc. of Letter Carriers, 413 U.S. 548 (1973) on the basis that the state can prevent the civil service from becoming a political machine, ignores the fact that such restrictions apply to out-of-office activities while in the instant case we have in-office

activities. Plaintiff's flyers had political overtones; if they could be controlled out of the office, obviously they could be controlled in the office. Furthermore Broadrick and Civil Service Commission, as appellees state, applied a balancing test of state and individual interests. In the instant case, the District Court utterly ignored the state's valid interests. No attempt was made to seek a balance.

POINT II

APPELLEES' ASSUMPTION THAT THE ACTIVITY PENALIZED WAS PUBLIC LEAFLETTING IS IN ERROR.

To assume that leafletting cannot be abridged in a publicly-owned place absent a compelling state interest is absurd. The courts have only allowed leafletting in places generally open to the public, and even then under reasonable restrictions. Wolin v. Port of New York Authority, 392 F. 2d 83 (2d Cir. 1968), cert. denied 393 U.S. 940; Albany Welfare Rights Organization v. Wyman, 493 F. 2d 1319 (2d Cir. 1974), cert. denied, ___ U.S. ___, 42 L. ed. 2d 64 (1974).

On the other hand there are many publicly-owned places where one cannot leaflet or demonstrate. Adderly v. Florida, 385 U.S. 39, 47, 48 (1966); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). We are sure that appellees would

not suggest that since the United States Courthouse is publicly owned, they can enter a Judge's chambers to distribute handbills. Obviously the state can maintain private areas closed to the public or employees not on official business. This must include before or after-hours entry to such offices if any security is to be maintained.

Public places are not government offices, per se.

It should be emphasized that the distribution here was not to fellow-employees, but rather to desks when no one was present on the chance those employees working there might see them. There was no audience to whom appellees were distributing.

POINT III

THAT APPELLEES WERE EMPLOYEES ENTITLED TO BE IN THE OFFICES OF DEFENDANTS DOES NOT ENTITLE THEM TO BE THERE AT OTHER TIMES.

Appellees appear to contend that since they are permitted to be in the office for work, they can be there before or after for passing out flyers on desks. Recently this Circuit held, United States ex rel. Horelick v. Criminal Court, 507 F. 2d 37, 41 (2d Cir. 1974), that a license to do

one thing, i.e. go in a front door of a school, is not necessarily a license to enter surreptitiously or stay after an authorized activity. Horelick, a teacher in the school, was convicted of criminal trespass for entering the school surreptitiously and staying after a concert during a school strike. The analogy is clear. If Horelick was guilty of trespass then so might appellees for their unauthorized activities. Grievance punishment was valid. It was noted in Horelick, id. at 41, that force or illegal methods were not proper; that proper methods (police and courts) were available. In the instant case, permission could have been obtained from defendants. It never was refused. The facts clearly show that the necessary permission was not obtained. Mistaken claim of right, Horelick at 40, does not excuse an improper entry or presence.

POINT IV

THE CONTEMPT HEARING WAS NOT A TRIAL.

As we expected, appellees at several points treat the contempt hearing as a trial. See Br. p. 16, ftn. However the contempt hearing cannot cure the lack of a trial. Defendants were forced at very short notice to defend themselves

and obviously could not make the extensive preparation necessary for a trial on the merits. On a trial it could be shown, for example, that other employees resent their desks being used as receptacles for inflammatory literature or being made a captive audience. Cf., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

CONCLUSION

THE JUDGMENT BELOW
SHOULD BE REVERSED.

Dated: New York, New York
March 5, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 5th day of March , 1975 , s he served the annexed upon the following named person :

Eve Cary
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Jeanette Marcelina

Sworn to before me this
5th day of March , 1975

A. Seth Greenwald

Assistant Attorney General
of the State of New York